

UNITED STATES DISTRICT COURT

**ORIGINAL**

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

CHASOM BROWN, WILLIAM BYATT, )	<b>Case Management Conference</b>
JEREMY DAVIS, CHRISTOPHER )	
CASTILLO and MONIQUE )	
TRUJILLO, individually and )	
on behalf of all others )	
similarly situated, )	
)	
Plaintiffs, )	
)	
vs. )	NO. C 20-03664 YGR
)	
GOOGLE LLC, )	Pages 1 - 54
)	
Defendant. )	Oakland, California
)	Friday, February 11, 2022
PATRICK CALHOUN, et al., )	
on behalf of themselves and )	
all others similarly )	
situated, )	
)	
Plaintiffs, )	
)	
vs. )	NO. C 20-05146 YGR
)	
GOOGLE LLC, )	
)	
Defendant. )	
)	
IN RE GOOGLE RTB CONSUMER )	NO. C 21-02155 YGR
PRIVACY LITIGATION, )	
)	

**REPORTER'S TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS**

(Appearances listed on next pages)

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1 Friday, February 11, 2022

12:04 p.m.

2 P R O C E E D I N G S

3 (Zoom Webinar)

4 **THE CLERK:** Now calling civil case 20-3664-YGR,  
5 Brown, et al. versus Google, LLC, et al.

6 We're going to be taking your appearances case by case but  
7 calling them all, so if you -- counsel, starting with the  
8 plaintiff, please state your appearance for the record.

9 **MR. LEE:** Sure. This is James Lee from Boies  
10 Schiller Flexner, here on behalf of plaintiffs in the *Brown*  
11 matter. With me today are Mark Mao and Erika Nyborg-Burch  
12 also from Boies Schiller Flexner.

13 **THE COURT:** All right. Mr. Lee, are you going to be  
14 the primary one speaking?

15 **MR. LEE:** Yes, Your Honor.

16 **THE COURT:** Okay. So then as we go through this, if  
17 you're not speaking, I'll have you turn off your videos just  
18 because there are so many squares on my monitor.

19 Okay.

20 And then for Google on the *Brown* case.

21 **MR. LEE:** I would be remiss if I didn't introduce the  
22 rest of my team who are also on the Zoom. It's John Yanchunis  
23 and Jean Martin from Morgan & Morgan. And Bill Carmody from  
24 Susman Godfrey.

25 **THE COURT:** Okay.

1                   **MR. LEE:** Sorry for interrupting.

2                   **THE COURT:** Defense?

3                   **MR. SCHAPIRO:** Your Honor, I'm Andrew Schapiro from  
4 the Quinn Emanuel for Google. There are only two of us here,  
5 so I'll let my colleague introduce herself.

6                   **MS. TREBICKA:** Good afternoon, Your Honor. Viola  
7 Trebicka with Quinn Emanuel also for Google.

8                   **THE COURT:** All right. Good afternoon.

9                   **THE CLERK:** Also calling civil case 20-5146-YGR,  
10 Calhoun, et al. versus Google, LLC.

11                   Counsel for that case, please state your appearance for  
12 the record.

13                   **MS. WEAVER:** Yes. Good morning, Your Honor. Lesley  
14 Weaver of Bleichmar Fonti & Auld. With me today from my firm  
15 is Angelica Ornelas. And also with me today is Jay Barnes  
16 from Simmons Conroy. And An Truong of that firm as well. And  
17 then David Straite from DiCello Levitt and Sharon Cruz with  
18 his firm.

19                   Good morning.

20                   **THE COURT:** Good afternoon.

21                   **MS. WEAVER:** Afternoon.

22                   **THE COURT:** Okay.

23                   **MR. SCHAPIRO:** For Google, it's the same cast of  
24 characters, Your Honor. Andrew Schapiro from Quinn Emanuel.

25                   **MS. TREBICKA:** Viola Trebicka for Quinn Emanu- --

1 from Quinn Emanuel for Google.

2 **THE COURT:** Okay.

3 And the last case?

4 **THE CLERK:** Also 21-2155-YGR, In re Google RTB  
5 Consumer Privacy litigation.

6 Counsel, starting with the plaintiff, please state your  
7 appearance for the record.

8 **MS. PRITZKER:** Good afternoon, Your Honor. And thank  
9 you, Mr. Garcia.

10 Elizabeth Pritzker of Pritzker Levine for the class  
11 plaintiffs. With me today are Nancy Nishimura from Cotchett,  
12 Pitre firm; Anne Davis from the Bleichmar Fonti & Auld firm;  
13 and An Truong from Simmons Conroy and Hanly.

14 **THE COURT:** Okay.

15 **MS. PRITZKER:** Thank you.

16 **THE COURT:** Thank you. Good afternoon.

17 **MR. GUTKIN:** Your Honor, Your Honor. For defendant  
18 Google LLC, it's Jeff Gutkin the Cooley firm, and I am  
19 appearing by myself.

20 **THE COURT:** Okay.

21 So we'll take these at least initially one at a time. As  
22 you know, you're all midstream. These are only recently  
23 reassigned to me. I have not gotten up to speed on your  
24 cases. I can tell right off the bat that Judge Koh did some  
25 things that I would not necessarily do so I will allow them,

1 but don't think it's precedent for cases come to me initially.  
2 Like, I don't give more than one summary judgment and, yet, it  
3 seems like she's allowing more than one. But we'll talk about  
4 that.

5 So the first case, *Brown vs. Google*, if I can have the  
6 lawyers.

7 **MR. LEE:** Sure. Sure, Your Honor. James Lee, Boies  
8 Schiller Flexner for the plaintiffs.

9 I think it might make sense --

10 **THE COURT:** Mr. Lee, you're very quiet. I'm having a  
11 hard time hearing you. I'm also not in my courtroom, so --  
12 I'm in a different courtroom, so maybe it's my system, but you  
13 seem to be very far away.

14 **MR. LEE:** How's this, Your Honor?

15 **THE COURT:** Much better. Thank you.

16 **MR. LEE:** I'll try to keep my voice up.

17 Given that -- that the cases are in midstream, I think it  
18 might make sense to start with the high-level overview of --  
19 of where things currently stand in the case and maybe, at  
20 least in the short term, where we're -- we think we're headed  
21 next. I defer to Your Honor, but I'm happy to do that for  
22 you?

23 **THE COURT:** Go ahead.

24 **MR. LEE:** Sure.

25 The *Brown* case, Your Honor, was filed in 2020, and the

1 case is -- is pretty far along. The *Brown* case concerns  
2 Google's collection and use of private browsing information.  
3 What Google does is it tells users that they are in control of  
4 what data Google collects. And Google tells its users that it  
5 won't collect their private browsing data if they turn on  
6 private browsing mode, including Google's own version of that  
7 which is called incognito mode. Now it turns out that Google  
8 collects browsing information anyway --

9 (Off-the-record discussion.)

10 **THE COURT:** Mr. Lee, do you have a headset?

11 **MR. LEE:** I do not have a headset, Your Honor. But I  
12 also don't have any other mics in the room. So maybe I should  
13 go a little slower. Perhaps that would help.

14 **THE COURT:** Okay. Go ahead.

15 **MR. LEE:** Sure.

16 So it turns out, Your Honor, that Google collects browsing  
17 information anyway even when users turn on private browsing  
18 mode. So this case is -- is really about Google's collection  
19 and use of private browsing data without users' consent.

20 And as I said before, this -- this case was filed in  
21 June 2020 before the *Calhoun* and *RTB* cases were filed. All of  
22 our claims have survived Google's motion to dismiss. And  
23 we're now nearing the end of fact discovery, which ends  
24 March 4th.

25 In -- during discovery, Google has produced millions of



1 pages of documents. Plaintiffs have taken 12 depositions  
2 of -- of Google employees and former employees. And we have a  
3 few others coming up shortly.

4 After today, all of the named plaintiffs in the case will  
5 have been deposed as well. And discovery thus far supports  
6 our core allegations, that Google collects private browsing  
7 information; Google uses that private browsing information for  
8 its own purposes and its own enrichment; and Google does all  
9 of this without user consent.

10 **THE COURT:** Okay. I understand --

11 Well, anything that -- Mr. Schapiro, do you want -- or  
12 who -- which of the two of you are speaking?

13 **MR. SCHAPIRO:** We're each covering slightly different  
14 areas, but I think this is in my bailiwick, if that's all  
15 right, Your Honor.

16 I don't know how much you want us to litigate that the --  
17 the substance or the merits here. You won't be surprised to  
18 hear that we have a very different view of what the actual  
19 facts are and what discovery has shown and will show.

20 Incognito behaves in precisely the way that it is billed.  
21 It does what it's supposed to do. It gives people a fresh  
22 cookie jar each time they open a device and use the -- open a  
23 new tab and use it. It deletes the cookies. There is no  
24 back-door cradle-to-grave profile made, as alleged in the  
25 complaint.

1 But I don't know whether -- whether Your Honor is  
2 interested in that or more about where the case is right now.

3 And on, that I -- I agree Mr. Lee on just about  
4 everything. The -- the chronology. This case is about 18  
5 months old. We are very close to, I -- I believe the end of  
6 discovery. And up -- for our part, we are eager to engage on  
7 class certification and dispositive motions, which we think  
8 will make it fairly easy to dispose of this case.

9 **THE COURT:** All right.

10 Well, everyone should know that I -- unless you've  
11 settled, I expect that you all differ on what the facts are  
12 until I hear otherwise.

13 But it is helpful to understand perspectives big picture,  
14 which is fine.

15 **THE COURT:** Okay. So I --

16 **MR. SCHAPIRO:** I'm sorry, Your Honor. There's one  
17 other thing that I should have mentioned, which is we have  
18 been thus far in the -- what I think we both would agree are  
19 the capable hands of Magistrate Judge van Keulen where we've  
20 had a whole lot of discovery issues to hash out and with a  
21 special master, who she appointed.

22 All of that is laid out in the case management statement  
23 so I don't think I need to go over it here.

24 **THE COURT:** Right. And I have -- and Judges  
25 van Keulen and DeMarchi will continue to operate as the

1 discovery judges for each of these cases. There's -- there's  
2 no point in moving that assignment. And there's -- would be  
3 a -- judiciously inefficient so they will remain.

4 With respect to, then -- what I show is fact discovery  
5 deadline closing March 4th; opening reports, March 18th;  
6 rebuttal reports, April 15th; discovery cutoff for merits  
7 discovery on the experts, May 19th.

8 Is that all correct?

9 **MR. LEE:** That's correct, Your Honor.

10 **MR. SCHAPIRO:** Yes, Your Honor.

11 **THE COURT:** So with respect to all cases, I do  
12 require the following -- make sure it happens: Expert  
13 reports, every single -- and this is in my standing order, so  
14 my standing orders now apply.

15 Expert reports, every paragraph must be individually  
16 numbered.

17 You must have an executive summary; that is, I want up  
18 front every opinion identified. The reason that I do this --  
19 and if you've litigated against -- in front of me before, you  
20 know why, but I'll repeat it.

21 The reason I do this is when I receive a *Daubert*, I want  
22 to know specifically what paragraphs or -- and/or opinions you  
23 are seeking to strike or to have excluded. I do this in part  
24 because many civil litigators do not seem to understand that  
25 experts cannot independently lay the foundation -- the factual

1 foundation for their opinions.

2 So I frequently get *Dauberts* seeking to exclude all sorts  
3 of material -- not as much anymore with this rule, but seeking  
4 to exclude material that comes in from others on hearsay  
5 grounds.

6 Well, obviously, if at trial, the information doesn't --  
7 upon which the expert's opinion is based does not come in, the  
8 expert's opinion does not come in.

9 So I don't want to see *Dauberts* or motions to strike  
10 information upon which the expert is relying and upon which  
11 there is an independent source.

12 Plus I want to know exactly what the opinions are because  
13 that's what matters. So the explanation of the opinion is all  
14 great, but I want to know opinion.

15 Any questions with respect to that process?

16 **MR. LEE:** No.

17 **MR. SCHAPIRO:** No, Your Honor.

18 **MR. LEE:** No, Your Honor.

19 **THE COURT:** Okay.

20 I also require that when your expert provides the opening  
21 report, you also provide simultaneously all of the data and  
22 background information that the expert relied upon. I do that  
23 to make sure that the process moves forward efficiently. And  
24 it applies to all sides.

25 Now, are your expert opinion reports -- are those supposed

1 to be simultaneous opening, or is it just the plaintiff?

2 What -- what's going on in that regard? And how many  
3 reports --

4 Who do you anticipate, Mr. Lee?

5 **MR. LEE:** So our expert reports for the plaintiffs  
6 are due March 18th, Your Honor. I think we anticipate a -- a  
7 damages expert.

8 **THE COURT:** You're -- keep your voice up.

9 You anticipate a damages expert?

10 **MR. LEE:** Yes. A -- and a class identification  
11 expert, a data scientist expert, and perhaps a -- a second  
12 data scientist expert.

13 **THE COURT:** Okay.

14 And are the defendants issuing opening reports?

15 **MS. TREBICKA:** Your Honor, we anticipate mostly  
16 having rebuttal reports. However, we are still considering  
17 whether or not there will be one or two affirmative reports at  
18 the -- on the March 18 deadline.

19 **THE COURT:** All right.

20 In terms of class certification briefing, I'm showing that  
21 you've got a May 26 opening; opposition, July 14th; reply,  
22 August 11th.

23 Is that correct?

24 **MR. LEE:** That's what I have, too, Your Honor.

25 **MR. SCHAPIRO:** Yes, Your Honor.

1           **THE COURT:** All right. With the hearing date of  
2           September 22nd?

3           **MR. SCHAPIRO:** Yes, judge.

4           **THE COURT:** Okay. That hearing date is moved. I --  
5           Thursdays is my criminal calendar days and not my civil  
6           calendar, so that hearing date will be moved to September 20th  
7           at 2:00 p.m. My trial day ends at 1:30. My civil calendars  
8           begin at 2:00 p.m.

9           **MR. LEE:** Understood, Your Honor.

10          **THE COURT:** Okay.

11           I see that there is a motion for relief from a  
12          non-dispositive order from Judge van Keulen. That motion will  
13          be decided on the merits. Just trying to get my arms around  
14          everything. The deadline has passed. It wouldn't have  
15          happened but for the transfer.

16           So does the plaintiff want to respond?

17          **MR. LEE:** Sure, Your Honor.

18           It's ultimately up to you. Our position obviously was a  
19          little different. We -- we thought that Judge Koh had the 14  
20          days to -- to rule that she wanted to.

21          **THE COURT:** Yeah, that argument's denied.

22           Do you want to respond to the substance in writing?

23          **MR. LEE:** Yes, Your Honor, we will.

24          **THE COURT:** How much time do you want?

25          **MR. LEE:** Would ten days be okay?

1           **THE COURT:** Yeah, ten days is fine.

2           I don't have a calendar up here. Do you have an extra one  
3 down there?

4           **THE CLERK:** I don't see one down here.

5           **THE COURT:** You know, it's in the -- on the back  
6 table if I have a -- if you grab my binder, just the white  
7 binder.

8           Okay. Ten days would be the 21st. What day of week is  
9 that?

10          **MS. TREBICKA:** It's a Monday, Your Honor.

11          **THE COURT:** And this is an Apex issue?

12          **MR. LEE:** Yes, Your Honor.

13          **MR. SCHAPIRO:** Yes, it is.

14          **THE COURT:** All right. So plaintiff's response,  
15 then, is due -- you can do the 21st. It's a holiday, but ECF  
16 is open.

17          **MR. LEE:** We're open for business, too, Your Honor.  
18 No problem.

19          **THE COURT:** Okay.

20          I haven't looked at the motion. Is it thorough? I mean,  
21 do you have anything to add?

22          **MR. SCHAPIRO:** No, Your Honor. I mean, we were  
23 limited, I believe, to -- to five pages. I think we did it  
24 under the existing rules when we filed it, but I think it's --  
25 it's pretty straightforward and we said what we need to say.

1 I think it's meritorious. I hope you'll grant it.

2 **THE COURT:** All right. Then once I get the  
3 opposition, I'll figure out whether I need anything more from  
4 either of you. If not, you'll see a decision.

5 **MR. LEE:** Your Honor, in our response, would you like  
6 us to attach the -- the prior briefing that was submitted to  
7 Judge have an cue 11?

8 **THE COURT:** No.

9 **MR. LEE:** Okay.

10 **THE COURT:** I mean, you can give my docket numbers,  
11 but I don't need it attached.

12 **MR. LEE:** Okay. Thank you.

13 **THE COURT:** Okay. Now, why is it that I have a  
14 motion to revise a class definition that's opposed? This is  
15 something you all can't agree on? What's the issue?

16 **MR. LEE:** Yeah, we were a little surprised that it's  
17 opposed as well. We think this is a -- a pretty  
18 straightforward issue. We aren't adding --

19 **THE COURT:** But what are you trying to do?

20 **MR. LEE:** We're just revising our class definition to  
21 conform to discovery, Your Honor. We're not adding any  
22 allegations or claims.

23 **THE COURT:** Are you narrowing it or expanding it?

24 **MR. LEE:** I think, Your Honor, we're really just  
25 clarifying it. I can -- I can explain if you'd like.



1       The -- the first -- the first change is that we are  
2       clarifying that we are dealing with a Chrome class and a  
3       non-Chrome class, so Chrome is Google's browser. And then the  
4       non-Chrome class are private browsing users that use other  
5       browsers, so that's -- that's one distinction we wanted to  
6       make.

7       The -- the second is that we're removing references to  
8       Google Analytics and Google Ad Manager in the class definition  
9       because discovery has shown that Google uses additional  
10      trackers beyond just these two, which was the only two we knew  
11      about when we -- when we crafted the initial class definition.

12           **THE COURT:** Okay. And why is it opposed?

13           **MS. TREBICKA:** Your Honor, our brief is currently  
14      due -- our opposition is currently due on February 17th. The  
15      parties have a stipulation for it to change to  
16      February 25th -- 25, and it's not ruled on. But our basic  
17      opposition is precisely because of what Mr. Lee said, which is  
18      that the case is being expanded from two products to all  
19      products within Google. And that is a change from what we've  
20      operating under for the last 18 months.

21           **THE COURT:** Response?

22           **MR. LEE:** Yeah, I -- I think it's a -- it's a little  
23      disingenuous to say that we're moving on all products, Your  
24      Honor. We're just moving on the actual products that are used  
25      by Google to track our class members without their consent.

1           So there are -- there are two main ones. We -- we think  
2           there's -- there's clearly a third based on discovery thus far  
3           AdSense -- and we believe there may be one or two more. And  
4           that's based on what's already been produced in the case.

5           So I don't think Ms. Trebicka is correct in saying that  
6           you know we are expanding the case such that now everything  
7           under the sun is coming in. It's just the -- the specific  
8           products or -- or technology that's been used to track our  
9           class members that -- that we are already aware of through  
10          discovery.

11           **MS. TREBICKA:** May I respond?

12           **THE COURT:** You may.

13           **MS. TREBICKA:** So it -- at a practical level, Your  
14          Honor, the case when it was filed was limited to two products,  
15          Google Ad Manager and Google Analytics. 18 months of  
16          discovery proceeded just on the basis of scope of the case  
17          being limited to those two products.

18          Discovery has now been pushed twice. We're at  
19          discovery -- the new discovery deadline is March 4th. We  
20          anticipate that if this motion were to be granted, it would  
21          change the scope of the case, and it would also threaten to  
22          up-end the discovery deadline and the rest of the schedule.

23           **THE COURT:** Have they asked for more discovery?

24           **MS. TREBICKA:** Not currently, Your Honor.

25           **MR. LEE:** (Shakes head.)

1           **THE COURT:** So what if they -- what I refuse to allow  
2           them any more discovery, then what's the prejudice?

3           **MS. TREBICKA:** The prejudice could also be in the  
4           amount of potential revenue that's related to their damages --

5           **THE COURT:** -- isn't an issue for me on terms of  
6           class definition. The question is whether or not something  
7           has been litigated. So if it's already been litigated, then I  
8           don't understand what the objection is. You may not like it,  
9           but if there's no prejudice in terms of what's actually been  
10          litigated, then I don't understand how you have a strong  
11          opposition.

12          **MS. TREBICKA:** So there is -- so if there is no new  
13          discovery, absolutely no new discovery, that's one thing. We  
14          haven't quite been told that so we were obviously not  
15          necessarily aware of it. But --

16          **THE COURT:** Is there a -- are you willing to concede  
17          and stipulate that you will not ask for any further discovery,  
18          Mr. Lee?

19          **MR. LEE:** Your Honor, I'm going to let Mr. Mao answer  
20          this 'cause I see him trying to jump in.

21          Go ahead, Mr. Mao.

22          **MR. MAO:** Good afternoon, Your Honor. Mr. Mao over  
23          at Boies Schiller Flexner. Sorry. I'm just trying to make  
24          sure the echo's not on my -- my end, Your Honor.

25          Is this loud enough?

1           **THE COURT:** Yes.

2           **MR. MAO:** Okay.

3           So if you look at the complaint, the complaint originally  
4           alleged that Google was --

5           **THE COURT:** I asked a specific question, Mr. Mao, and  
6           I'm asking for an answer to that question.

7           **MR. MAO:** Understood.

8           So we -- the issue here is whether pending discovery, Your  
9           Honor, would with cover the products in which Google --

10          **THE COURT:** -- you asking for more discovery --

11          **MR. MAO:** No.

12          **THE COURT:** -- and will you stipulate?

13          **MR. MAO:** No new discovery.

14                               (Simultaneous colloquy.)

15          **THE COURT:** Will you stipulate to no more discovery  
16          and standing on what you have?

17          **MR. MAO:** It's -- well, Your Honor, we're asking to  
18          stand on what has already been issued. Most of the discovery  
19          at issue has already been issued for months. And what we're  
20          fighting over, Your Honor, is whether or not the new products  
21          which are actually covered by the documents that Google has  
22          produced -- so Google has recognized these products as being  
23          responsive.

24          **THE COURT:** Mr. Mao, you're going to have a hard time  
25          in front of me if you can't answer simple questions.

1 Discovery closes March 4th. Right?

2 **MR. MAO:** Yes, Your Honor.

3 **THE COURT:** Okay. So are you asking for more  
4 discovery? Are you trying expand the nature of discovery?

5 **MR. MAO:** No, Your Honor. We're standing on the  
6 discovery already served --

7 **THE COURT:** -- Trebicka, what's the issue?

8 **MS. TREBICKA:** So, Your Honor, the issue is this:  
9 There is certain discovery that has already been served. And  
10 it's so broad that it encompasses topics, importantly  
11 products, that we believe are outside of the scope. So we  
12 have responded to that discovery with the understanding that  
13 the scope is limited to Google Ad Manager and Google  
14 Analytics.

15 This issue arose because in the context of responding and  
16 negotiating 30(b)(6) testimony, plaintiffs wanted to expand it  
17 to something that we thought was unreasonable and almost  
18 impossible to prepare a 30(b)(6) on, so this is -- so it will  
19 actually mean more discovery despite the fact that it will --  
20 it will not mean new issuing of discovery because the scope of  
21 a -- of the ambiguous and vague discovery requests that have  
22 already been served will be expanded.

23 **MR. MAO:** Would you like me to respond, Your Honor?  
24 Or --

25 **THE COURT:** Go ahead.

1           **MR. MAO:** So, Your Honor, the discovery is not being  
2 expanded because we are merely following up on the very  
3 products Google has produced in response to the discovery that  
4 has already been served.

5           Insofar as Google -- there's really two products at issue,  
6 Your Honor. It's Google Search, which is also being tracked  
7 off of Google.com when people are incognito, and then AdSense,  
8 which as Mr. -- Mr. Lee had referenced.

9           Those things were identified by us because they were  
10 identified by Google in response to discovery, saying that  
11 these were also things in which Google was tracking users on.

12           So we accordingly, of course, in response to what Google  
13 thought was responsive, believe that that belongs in the case.  
14 There is no prejudice because they have been producing  
15 documents on that. What they want to do is they want to  
16 exclude that notwithstanding the fact that their own engineers  
17 and custodians recognize this as responsive.

18           **THE COURT:** And this relates to all of the discovery  
19 disputes that are still pending before Judge van Keulen?

20           **MR. MAO:** Yes, Your Honor.

21           **MS. TREBICKA:** To a fair number of them.

22           **THE COURT:** Well, I will talk to her about the scope.

23           I would suggest that you all focus on prejudice and the  
24 scope of discovery in terms of your briefing.

25           **MR. MAO:** (Nods head.)

1           **THE COURT:** Okay.

2           Summary judgment. What is your deadline?

3           **MR. LEE:** Apologies, Your Honor. I don't have the  
4           summary judgment deadline in front of me.

5           **MS. TREBICKA:** Your Honor, I -- I don't believe that  
6           we have set a summary judgment deadline. We only -- we're  
7           only up to class certification hearing.

8           **MR. LEE:** I think that's right.

9           **THE COURT:** Do you need an answer on class  
10          certification before you can file a motion for summary  
11          judgment?

12          **MR. LEE:** For plaintiff's purposes, no, Your Honor.

13          **THE COURT:** Is plaintiff planning on filing a motion  
14          for summary judgment?

15          **MR. LEE:** We are -- I don't want to rule it out,  
16          but -- it's in discussion. I think likely not, but I don't  
17          want to rule it out. I think it's still a possibility.

18          **THE COURT:** Right.

19          For the defense.

20          **MR. SCHAPIRO:** I don't think we do either, Your  
21          Honor. Obviously, there are practical reasons why it might  
22          make sense to know about class cert before. But I don't think  
23          it -- as a -- in terms of the legal arguments we'd be making,  
24          as long as we've completed all -- all -- you know, discovery  
25          and expert discovery with enough time.

1           **THE COURT:** Okay.

2           So let me give you a deadline.

3           If you don't need an -- I mean, I would take it with  
4       respect to -- and I'll have a question on the *Calhoun* case,  
5       but to the extent you want to bring summary judgment, I would  
6       expect -- well, are you -- would the plan be to do that  
7       relative to the whole class, or is the plan that it would  
8       relate to the named plaintiffs only?

9           **MR. SCHAPIRO:** Well, Your Honor, I'll be candid. I  
10      don't know if we -- we're very far along in our thinking on  
11      that. But my expectations would be as to the named plaintiffs  
12      who presumably stand in the shoes of the entire class. And if  
13      they -- if they don't have a claim, no one in the -- in the  
14      class will have a claim.

15      I'm cognizant of your -- your rule that we need to file --  
16      we would need to file pre-motion letter first and have a brief  
17      conference in front of for any proposed summary judgment  
18      motion. But I'll --

19                               (Simultaneous colloquy.)

20      **THE COURT:** Reason I ask, Mr. Schapiro, is that if  
21      you anticipate that this motion relates only to the named  
22      plaintiffs, then I want the briefing to be done on the same  
23      schedule, and I'll look at everything at once. It's more  
24      efficient for me to do that it way.

25      If you anticipate that you want to bring a motion after



1 class certification because you want the ruling to apply to  
2 the entire class, as opposed a ruling to be applied to an  
3 individual plaintiff, then I have to schedule something  
4 different.

5 **MR. SCHAPIRO:** So I'm pausing because I'm thinking  
6 here, Your Honor. And it seems like that the stakes are  
7 somewhat high with regard to that. And I -- I don't think  
8 I've thought it in -- in that way. What you're saying -- it's  
9 a very -- it's a rational question.

10 **THE COURT:** This is what I will do then: I'm going  
11 to issue an order that says that if you intend to bring your  
12 motion relative to the individual plaintiffs, it needs to be  
13 filed by August 2nd. Right? Thirty-five -- that way we get  
14 it all teed up 35 days' notice unless you anticipate it being  
15 something bigger than that.

16 If it -- if the motion is -- you want it to be relative to  
17 the entire class, then 35 days after the court's ruling on  
18 class certification.

19 **MR. SCHAPIRO:** Perfect.

20 **THE COURT:** Okay. Until I know whether or not this  
21 is a class action or an individual action, I won't give you a  
22 trial date. But I anticipate that this will go to trial,  
23 then, at the beginning of 2023 so we'll know sometime in the  
24 fall, right? Because there's nothing to be done -- not much  
25 once we get past class certification, correct?

1           **MR. LEE:** I think that's right, Your Honor.

2           **MR. SCHAPIRO:** Yes.

3           **THE COURT:** Okay.

4           I have a number of big trials in 2023 so I don't want set  
5 it until I know I've got some open space for you.

6           Okay. Anything else we should do on this one?

7           **MR. LEE:** Not from plaintiffs, Your Honor.

8           **MR. SCHAPIRO:** Nothing here, Your Honor.

9           **THE COURT:** Okay.

10          If I can get *Calhoun vs. Google* up.

11          **MR. MAO:** Thank you, Your Honor.

12          **THE COURT:** Thank you.

13          Okay. So on *Calhoun* -- and let's see, again, I have  
14 Mr. Schapiro and Ms. Trebicka -- -bicka [phonetic]? 'Becca  
15 [phonetic]?

16          **MS. TREBICKA:** Trebitzka [phonetic]. If --

17          **THE COURT:** Trebicka [phonetic]?

18          **MS. TREBICKA:** Trebitzka [phonetic].

19          **THE COURT:** So I'm seeing T-r-e-b-i-c-k-a.

20          **MS. TREBICKA:** Correct. It's an Albanian name. The  
21 correct pronunciation is Trebitzka [phonetic], and I'm still  
22 kind of holding on to that. But Trebicka [phonetic] will be  
23 just fine, too.

24          **THE COURT:** Well, yeah -- and the audio's not great,  
25 so I think there's an extra sound in there that I'm missing.

1 We'll wait till I have you in person and I can hear it better.

2 Okay. And then on the plaintiff's side, looks like  
3 Ms. Weaver, Mr. Straite, is it?

4 **MR. STRAITE:** (Nods head.)

5 **THE COURT:** And Mr. Barnes.

6 Okay. Similarly, we have close of fact discovery  
7 March 4th; expert reports, March 17th. You've heard -- any --  
8 and then rebuttal reports, May 5th. You all heard my comments  
9 with respect to experts.

10 Do you have any questions?

11 **MS. WEAVER:** Your Honor, Lesley Weaver on behalf of  
12 the plaintiffs, and I think there are some complexities here  
13 that you're already noticed.

14 We already have experts for class cert. If -- we defer to  
15 the court, but it might be useful to refresh and recount what  
16 has already happened and been briefed and is pending, because  
17 there are complexities and I think had we been before Your  
18 Honor, you're right, they would not have occurred.

19 **THE COURT:** All right. Go ahead.

20 **MS. WEAVER:** Okay. So we filed for class  
21 certification. We moved on October 14th. Our reply brief was  
22 actually due today. We are grateful to the court for giving  
23 us a few more days to get that reply brief in because we're  
24 also taking two depositions today and another one on Monday by  
25 stipulation.

1 In any event, as you saw, Judge Koh had a -- the -- the  
2 schedule that you just noted, which was the summary judgment  
3 schedule.

4 Google filed a motion for summary judgment on  
5 November 30th. We had not discussed that. They did grant us  
6 an extension of time to respond from December 22nd  
7 January 14th.

8 The issue is consent. Google is seeking to dispose of all  
9 of our claims on consent. We do oppose. We think we will  
10 prevail.

11 There's currently a hearing date set for March 10th on  
12 that motion. Class cert, you set a hearing on May 31st. If  
13 Your Honor wished, we could put the hearing for both motions  
14 on the same day. The wrinkle is that plaintiffs would like to  
15 move for summary judgment. And that is the schedule that you  
16 see before you.

17 Even if we stood where we were, we were going to ask for a  
18 little bit of time. The date March 17th was set before *Brown*  
19 extended their cutoff and so ours was, which is to say the  
20 close of fact discovery used to be in January. And we have no  
21 time between opening expert -- merits experts, so maybe if we  
22 could move that out a little bit. I realize it gets complex,  
23 but I'm showing you the problems and you can tell us how you  
24 would like to handle it, Your Honor.

25 **THE COURT:** Okay. Well, you -- well, you jumped

1 around a lot. Let's do a couple of things.

2 One, I take it, just because of the timing, that because  
3 Google has filed for -- on a motion for summary judgment on a  
4 defense, that that defense -- a ruling on that only applies to  
5 the named plaintiffs. It doesn't apply to the class.

6 There is no class certification of a class, right? So by  
7 definition, it can't apply to a class.

8 **MR. SCHAPIRO:** Right. So -- and I think I -- I  
9 understand a little better what you were saying now *Brown*. So  
10 I can see how certainly in some cases, there would be a  
11 question, you know, is this *res judicata*? Is it binding on a  
12 class? And I suppose as a technical matter --

13 **THE COURT:** It's not binding on the class until I  
14 certify the class.

15 **MR. SCHAPIRO:** Sure. Sure. So -- so would it be  
16 binding on other people, other people who are not the named  
17 plaintiffs. Our belief -- the only reason we filed this is  
18 that the logic applies to -- to all users of -- of -- of the  
19 product. And yes, I --

20 (Simultaneous colloquy.)

21 **THE COURT:** This issue has been litigated before the  
22 Ninth Circuit. And, in fact, I had to -- I inherited a case  
23 which created huge difficulties when the judge -- the trial  
24 judge there, granted summary judgment, had -- had not  
25 certified the class. It went up to the Ninth Circuit. It

1 came back. And the Ninth Circuit said, this cannot apply to  
2 the class, which created major issues. I do not intend to  
3 trod that path again.

4 So I don't know what your motion's -- I don't know if it's  
5 good, if it's not. I haven't read it. But until I certify a  
6 class, it doesn't apply to the class.

7 **MR. SCHAPIRO:** I -- I agree with that a hundred  
8 percent and -- and understand.

9 I was simply trying to say that I -- with our eyes wide  
10 open, we believe there is a very strong practical benefit  
11 to -- to having the issue decided at an early time.

12 **THE COURT:** How is this early? This case was -- this  
13 is a 2020 case. It's 2022. That's not what I would consider  
14 certainly early.

15 **MR. SCHAPIRO:** Fair enough. It is -- it is -- by  
16 "early" I meant prior to class cert briefing, and this was  
17 filed prior to the close of discovery.

18 **THE COURT:** Okay.

19 Again, I don't -- I don't see the benefit given that it  
20 can't apply to the class.

21 But -- and I -- and I take it that Judge Koh does not have  
22 a rule -- or is this your one shot?

23 Does Judge Koh have the rule that you can only file one  
24 summary judgment per case?

25 **MR. SCHAPIRO:** She does not. She did not.

1           **MS. WEAVER:** I will note, if I might, she did have a  
2 rule that only three *Dauberts* are permitted. I don't know --  
3 I think because --

4           **THE COURT:** -- that rule. I may impose that rule on  
5 all the rest of my cases.

6           **MS. WEAVER:** Yeah, it's not a bad rule. I think  
7 the -- the issue here perhaps is that in the transition, you  
8 know, maybe there wasn't an opportunity to really kind of  
9 identify look and -- and sort this issue, because it's  
10 certainly thorny, and Your Honor has the pleasure of trying to  
11 sort it out.

12           We would propose they could be heard on the same day.  
13 Plaintiffs do think that we can dispose of this summary  
14 judgment motion. We did note that Google said in their case  
15 management conference statement they wanted to bring another  
16 motion for summary judgment, and we would oppose that.

17           **THE COURT:** Well, I'm not -- that I'm not willing to  
18 do. If that wasn't Judge Koh's rule -- look, if you're  
19 litigating in front me, you know going in you get one and  
20 that's all you get. So you pick carefully. And -- and that  
21 rule applies going forward. So the other cases you do not get  
22 more than one. You choose which -- which one you want. But I  
23 don't think it is fair to apply that rule retrospectively when  
24 Judge Koh didn't have that rule.

25           So you can have one more, Mr. Schapiro, after this.

1 This is what I'll do. If I can get to it, I will. If I  
2 can't, then I'll put it on the -- on the 31st. You all should  
3 know I've got six patent cases stacked up for trial beginning  
4 that week. So we'll see if I even get to it then.

5 We are now in a judicial emergency. We have lost multiple  
6 judges, and we don't have any new ones so all of you should be  
7 thinking whether you should be filing motions in front of any  
8 of us in this district because we've all had to absorb  
9 Judge Koh's cases, which are significant cases, and we have no  
10 help.

11 So just so that you know, we are literally in a judicial  
12 emergency. I do not want to see motions from you that  
13 shouldn't be filed. And, frankly, with some of these, you're  
14 going to get very curt answers because we don't have the time  
15 to do big orders at this juncture.

16 The motion with respect -- the summary judgment, again  
17 this is set for Thursday. I cannot do it on Thursday. We'll  
18 reset that for March 15th hearing, which is the next Tuesday.  
19 Okay?

20 Let's see. On the -- on the hearing on class  
21 certification, what is -- what is the -- is that fully  
22 briefed?

23 **MS. WEAVER:** Your Honor, our reply brief --

24 **MR. SCHAPIRO:** No, Your Honor.

25 **MS. WEAVER:** I apologize.



1 Our reply brief was due today. It will be coming in next  
2 week as soon as we get deposition transcripts. We don't have  
3 a date fixed. We hope to file by the 15th or 16th. I just  
4 would -- I would note for the record, Your Honor, that as a  
5 matter of equity, allowing Google two summary judgment motions  
6 and plaintiffs one doesn't seem fair. And we would ask  
7 certainly that they not be allowed to move on consent again.  
8 They have moved on consent. And that is their shot.

9 And then Your Honor can decide whether or not, I guess, it  
10 applies to the class as res judicata, but it -- it has been --  
11 it was not insignificant to the resources in the middle of  
12 discovery to have that motion come in as a surprise without  
13 conferring. And I think that's why Your Honor has the rule,  
14 so we just need to note for the record, Your Honor. We  
15 understand your ruling.

16 **THE COURT:** I think that that's fair. There won't be  
17 another further motion on consent.

18 Mr. Schapiro, if -- if you want -- if you want to maintain  
19 that as your -- as your motion to the named plaintiffs, that's  
20 fine. You will not get another opportunity on consent with  
21 respect to the class. Your other option is to withdraw it  
22 without prejudice. I haven't read it. There's -- from my  
23 perspective -- and if it's the same arguments, it's the same  
24 arguments. So you can think about that. But I think it's  
25 fair this is your only shot on consent.

1           **MR. SCHAPIRO:** That's helpful, Your Honor. We  
2 will -- we will take that back and think about it.

3           **THE COURT:** What's today? The 11th?

4           **MS. WEAVER:** It is.

5           **THE COURT:** If you're going to withdraw it, you must  
6 withdraw it by February 25th. I don't want to have a start on  
7 it only to you with- -- you to withdraw it at the last minute.

8           **MR. SCHAPIRO:** Definitely.

9           **THE COURT:** Okay.

10           Let's see.

11           Okay. So you want to talk about ADR?

12           **MS. WEAVER:** We could, Your Honor.

13           Did you want -- I did have a question about the opening  
14 expert report date and if we could adjust those. And what I  
15 might even propose is if we can hear from opposing counsel  
16 after they make their decision about whether they're standing  
17 on their summary judgment motion, maybe we could confer and  
18 would Your Honor allow us to -- to set a -- a slightly  
19 modified briefing schedule for -- or sorry -- expert schedule  
20 for you to consider?

21           **THE COURT:** Well, right now, the summary judgment  
22 deadline and *Daubert* deadline -- the motions are to be filed  
23 August 5th, oppositions September 2nd, with replies  
24 October 7th, right?

25           **MS. WEAVER:** Yes.

(Simultaneous colloquy.)

**THE COURT:** Currently the close of expert discovery is June 30th. Right?

**MS. WEAVER:** Correct.

What I would say, Your Honor, is we have each put forward five experts on class cert. We've deposed them. We just -- I don't want to move much out. I would leave the briefing schedule but just maybe move that opening expert report deadline out by maybe a week because we have seen a lot of these people unless we're all coming in with a new slew of experts that I suppose that could be true. But I think if you could just give us a week to March 24th and a week to May 12th on the rebuttal, that would give us just a little bit of breathing room. And then we don't have to change anything else on the schedule, Your Honor.

**THE COURT:** There an objection?

**MR. SCHAPIRO:** No objection.

**THE COURT:** So ordered.

Okay. Did you -- did you include in the -- back on the motion for summary judgment, Mr. Schapiro, did you include new authority issued after plaintiffs' opposition?

**MR. SCHAPIRO:** We cited one case in one footnote, Your Honor, in our reply brief.

**THE COURT:** And what -- was that?

**MR. SCHAPIRO:** As I stand here, Your Honor, I -- I

1 don't recall.

2 **THE COURT:** All right.

3 (Simultaneous colloquy.)

4 **MR. SCHAPIRO:** -- I know that that's the reason they  
5 are -- they've come to us and asked for, I think -- have also  
6 put in the case management statement that they would be  
7 seeking a surreply. I don't think we would have any objection  
8 to, you know, a -- a paragraph or something on the import of  
9 the case, but we don't believe it would be fair to allow them  
10 a surreply because we cited one case in a footnote.

11 (Simultaneous colloquy.)

12 **MS. WEAVER:** -- your Honor?

13 **THE COURT:** One case in a footnote?

14 **MS. WEAVER:** It is a case, yes. It is a case decided  
15 by Chief Judge Seeborg against Google on the issue of one of  
16 the very consent arguments that Google makes in this case, and  
17 he held that one -- it's called "whack," is the acronym --  
18 that the whack screen is not part of Google's contract as a  
19 matter of law.

20 And we believe it disposes on their entire motion, which  
21 is premised -- so for that reason, we would ask for a little  
22 more than is customary. Certainly a statement of recent  
23 decision should have no argument, but we would like to be able  
24 to address it.

25 **THE COURT:** You get one page. That's it.

1           **MS. WEAVER:** Okay.

2           **THE COURT:** Okay.

3           All right. I think -- I think that's all, then, for this  
4 case. Any questions?

5           And just a reminder, you do have to consult with me before  
6 filing those summary judgment motions.

7           **MS. WEAVER:** Understood, Your Honor.

8           **THE COURT:** Okay. Anything else on this one?

9           **MR. SCHAPIRO:** No, Your Honor.

10          **MS. WEAVER:** No.

11          **THE COURT:** All right. Let's go ahead and move then  
12 to the *In re: -- In Re: Google RTB Consumer Privacy*.

13          Now, one -- one thing on this, it appears that *Delahunty*  
14 and *Toronto* -- this is 21-3360 and 21-3725 are still pending  
15 but were consolidated into 21-2155; is that right?

16          **MS. PRITZKER:** Yes. If I can respond to that, Your  
17 Honor. Elizabeth Pritzker.

18          *Delahunty*, *Toronto*, *Hewitt* were all consolidated into the  
19 Google -- *In Re: Google Consumer Privacy*.

20          **THE COURT:** Okay.

21          **MS. PRITZKER:** *In re: Google RTB Consumer Privacy*.

22          Excuse me. But yes.

23          **THE COURT:** What I'm going to do -- 'cause they're  
24 still showing up on the docket -- I am hereby administratively  
25 closing 21-3360 and 21-3725 because I almost issued an order

1 to show cause why I shouldn't sanction you all for filing CMC  
2 statements in these other cases that were on my docket.

3 We're just going to administratively close them. I see no  
4 reason to have them open. Good?

5 **MS. PRITZKER:** Understood, Your Honor.

6 **MR. GUTKIN:** No objection, Your Honor.

7 **THE COURT:** You've now just eliminated two of my  
8 cases like that (snaps fingers), so I'm very happy about that.

9 **MS. PRITZKER:** Happy to accommodate.

10 **THE COURT:** This case, then, I take it is different  
11 from the other two?

12 **MR. GUTKIN:** It is, Your Honor.

13 **MS. PRITZKER:** It is.

14 **MR. GUTKIN:** Factually and in terms of for how long  
15 it's been pending at the stage at which it's at.

16 **THE COURT:** And as I understand it, the other ones  
17 are about the collection. This is more about the  
18 dissemination.

19 **MS. PRITZKER:** That's correct, Your Honor. It's --  
20 It's a different -- we're challenging a different practice, a  
21 different premise. And it is -- it is about dissemination and  
22 sale of private data as opposed to collection and -- of -- of  
23 private data from account users; that's correct.

24 **THE COURT:** Okay. So I'm surprised that there's  
25 still a pending motion to dismiss, but you're moving forward

1 in any event, so what's -- why -- what am I dealing with here?

2 **MR. GUTKIN:** Your Honor, this is Jeff Gutkin on  
3 behalf of Google.

4 They [sic] refiled the motion to dismiss, and it was fully  
5 briefed. And Judge Koh just shortly before, almost  
6 simultaneously with the -- her elevation to the Ninth Circuit,  
7 vacated the hearing on the motion to dismiss. So it remains  
8 pending. Google think -- thinks it's appropriate to convene a  
9 hearing to resolve the motion to dismiss, but we, of course,  
10 defer to Your Honor's preference on that.

11 **THE COURT:** But what -- what is the -- and -- will --  
12 is it trying to narrow the case? Trying to get rid of the  
13 entire case? Why am I spending time on this?

14 **MR. GUTKIN:** Well, yes, Your Honor. It would be a  
15 motion to resolve the case. For example, our initial argument  
16 is that the plaintiffs have not adequately alleged standing,  
17 that they have not pled facts specific to the activities and  
18 conduct of the named plaintiffs that would allow the case to  
19 go forward.

20 Then we additionally have arguments on each of the claims,  
21 Your Honor. Each of the eight claims at issue.

22 **MS. PRITZKER:** I think that's right, Your Honor.  
23 There -- there are really three issues, I think, that are  
24 framed by the motion to dismiss that are -- there are the  
25 usually pleading challenges that defendants bring to all

1 causes of action, so there are those challenges.

2 There is an issue with respect to plaintiffs' standing,  
3 which we have briefed. We think that under the Facebook  
4 Internet tracking case and other Ninth Circuit precedent, that  
5 we have certainly alleged all facts necessary to support  
6 standing under that precedent as well as under *Spokeo*, but  
7 that is a matter of the -- of the briefing before Your Honor  
8 on the motion to dismiss.

9 And then there are issues regarding the -- consent, I  
10 guess, which are also raised in the motion to dismiss which --  
11 you know, there -- there are going to be factual disputes on  
12 all of these, but these -- these are matters that are raised  
13 in the motion to dismiss in large part.

14 **THE COURT:** And notwithstanding that, and  
15 notwithstanding that we have two cases that are similar but  
16 not identical that have been in the process of being  
17 litigated, you've got a substantial document production  
18 completion by April, in two months?

19 Mr. Gutkin, really?

20 We're really spending time on that motion to dismiss in  
21 light of everything else that's happening?

22 **MR. GUTKIN:** Well, yes, Your Honor. We did not think  
23 that Judge Koh would permit us to stand down on discovery. Of  
24 course, if Your Honor would entertain a motion to stay  
25 discovery while the motion --



1           **THE COURT:** Denied.

2           **MR. GUTKIN:** So yes, Your Honor. We proceeded with  
3 discovery in good faith, and Judge Koh entered the substantial  
4 completion deadline for document production.

5           However, in terms of whether plaintiffs have adequately  
6 alleged standing, and whether their claims are viable, Google  
7 believes it's appropriate to have the motion to dismiss ruled  
8 upon even as we proceed with discovery as ordered by  
9 Judge Koh.

10          **THE COURT:** Well, my sense is that Judge Koh probably  
11 didn't think much of the motion, which is why she allowed  
12 discovery to proceed while this motion was just sitting there.

13          So if you're going to force me to look at it, I'll look at  
14 it, and I will, of course, deal with it. But it doesn't --  
15 but I query whether it's really worth the court's attention.

16          But we'll deal with it.

17          **MR. GUTKIN:** Thank you, Your Honor.

18          **THE COURT:** I may not give you much of a hearing.

19          **MR. GUTKIN:** Understood.

20          **THE COURT:** Class certification briefing, June 23rd;  
21 opposition, August 4th; reply, September 2nd.

22          **MR. GUTKIN:** Correct, Your Honor.

23          **MS. PRITZKER:** That's correct, Your Honor.

24          We do have a case schedule, unlike the other cases that we  
25 both -- it does go through trial, and I guess now that the

1 cases is in front of Your Honor, that may change. But we --  
2 we did have a case schedule that was issued in Docket 83 back  
3 in September that -- actually it does go all the way through  
4 trial.

5 **THE COURT:** Curious why she gave you a trial date but  
6 not the others.

7 **MS. PRITZKER:** Because we asked for it.

8 **THE COURT:** Okay.

9 **MS. PRITZKER:** Again I know that your procedures,  
10 having appeared in front of you, are very different from  
11 Judge Koh's. Certainly I know some of the hearing dates we've  
12 established in there are going to change because they're not  
13 set on Tuesdays. And if it's Your Honor's inclination to  
14 vacate that trial date, reset it at a later time in light of  
15 your -- Your Honor's jury trial schedule, we understand that.

16 But currently that is the schedule that we stipulated to  
17 and negotiated and one that Judge Koh ordered.

18 **THE COURT:** All right. Well, the class cert motion  
19 hearing I'll align with the other ones, so we'll make that  
20 September 20th, and that's at 2:00 p.m. 'cause my trial day  
21 ends at 1:30.

22 December 15th for your fact discovery cutoff is fine.  
23 Opening experts, January 12th is fine. Rebuttal February 9th  
24 is fine. And then close of expert discovery March 2nd is  
25 fine.

1 Do you have any questions about expert discovery?

2 **MR. GUTKIN:** Not for Google, Your Honor.

3 **MS. PRITZKER:** Not at this time, Your Honor.

4 **THE COURT:** And in terms of dispositive motions and  
5 *Dauberts* -- oh, see here, she did impose it, one dispositive  
6 motion per side. That's it. And I will keep her three  
7 *Dauberts* per side.

8 And all of you should remember *Dauberts* are not to be  
9 brought just because you disagree with a conclusion. I don't  
10 know how often district judges have to say that. It doesn't  
11 seem to sink in because we so often get *Dauberts* just because  
12 people don't like the -- what the conclusion is of the other  
13 side. That isn't a basis. The question is, is there a lack  
14 of foundation, really, for the opinions that are being  
15 brought.

16 So, again, be judicious with -- with those motions. I can  
17 tell you I have now a stock paragraph that I use to deny them.  
18 So think about what it is you're asking us to do.

19 **MS. WEAVER:** Your Honor? I -- I apologize. I do  
20 have a question on that point.

21 We had -- we had *Dauberts* ready to file in our reply brief  
22 on class cert. If we don't know what is happening and whether  
23 there will be a summary judgment motion with different  
24 experts, we're prejudiced by being forced to make that  
25 decision in the dark right now whereas if you -- to clarify,

1 the original summary judgment motion has no experts, so if we  
2 use our three on class cert, we're fine.

3 **THE COURT:** -- I'll get back to you.

4 **MS. WEAVER:** Okay.

5 **THE COURT:** All right. August 21st.

6 **MS. PRITZKER:** Yes, Your Honor, that would be our --  
7 our jury trial date. And I think the pretrial conference may  
8 not quite align with your procedures either, but it's close, I  
9 think.

10 **THE COURT:** Yeah, so you can keep the date since it  
11 was already ordered. Your pretrial conference, those -- I do  
12 them on Friday so July 28th, not 27th, and it's at 9:30 a.m.,  
13 not at 1:30 p.m.

14 **MS. PRITZKER:** I had in my notes either the 26th or  
15 the 28th, so I guess it was close. Sometimes it's Wednesdays,  
16 and sometimes it's Fridays.

17 **THE COURT:** Correct. Sometimes Wednesday; sometimes  
18 Friday. I don't have standing calendars on those two days.

19 The only thing I will say about that is that with that  
20 trial date, and a pretrial conference on July 28th, that means  
21 under my standing order, your pretrial filings are due  
22 July 14th, which means that you are exchanging exhibits by  
23 June 14th, which is two weeks after your hearing on  
24 dispositive motions.

25 The likelihood that I'm going to have an answer for you

1 two weeks later, depending on the docket, may be low. So you  
2 could be preparing for trial without an answer on your summary  
3 judgment.

4 You sure you want to keep that date?

5 **MR. GUTKIN:** Your Honor, I -- I -- your point is well  
6 taken, and perhaps Ms. Pritzker and I, assuming she's amenable  
7 to this, should take a look at that before we formalize the  
8 entire schedule.

9 **THE COURT:** Ms. Pritzker? I mean, you've been in  
10 trial with me before. You know my filings are not  
11 insignificant.

12 **MS. PRITZKER:** No, they are not insignificant. They  
13 are quite an undertaking.

14 It's not clear that the plaintiffs are going to be filing  
15 dispositive motions, so this wouldn't necessarily be an issue  
16 that would impact us. I would be happy to confer with  
17 Mr. Gutkin further to see if we can move that date later into  
18 the fall if that's your preference.

19 I know late July is often a problem for the Ninth Circuit  
20 conference and other things, too, so we could --

21 (Simultaneous colloquy.)

22 **MS. PRITZKER:** We could move it a couple months.

23 **THE COURT:** We can keep it there for now. It was  
24 given to you. We can keep it there for now. I'm just telling  
25 you what the practical import is of that trial date.

1           **MS. PRITZKER:** Understood.

2           **THE COURT:** And, again, I need to move your hearing  
3           date from May 25th, which is a Thursday. I'll give you  
4           May 30th, which is a Tuesday. And even that is just two weeks  
5           after -- I mean, how many? I don't know -- potentially six  
6           Dauberts and a summary judgment, so -- may or may not  
7           happen -- you know, I may not be able to do all of that in two  
8           weeks. But we'll see.

9           **MS. PRITZKER:** Again, Mr. Gutkin -- can go back and  
10          look at that and obviously take Your Honor's in consideration.  
11          I know that you are busy, and maybe we can give you some  
12          relief on that and --

13          **THE COURT:** I'm sure.

14          **MS. PRITZKER:** -- give defendants some relief as  
15          well.

16          **THE COURT:** I'm sure I'll see you before then.

17          Okay. I think -- anything else on your case?

18          **MS. PRITZKER:** One other matter. We do have three  
19          pending discovery matters in front of Judge -- Magistrate  
20          Judge DeMarchi, which is -- she's spent a lot of time with us  
21          last week and -- and gave us a lot of good direction, and we  
22          are awaiting a ruling from her.

23          There is one issue with respect to a Texas  
24          Attorney General document production that was previously an  
25          issue that there was some -- I guess some lack of clarity in

1 Judge Koh's orders regarding what should be produced out of  
2 that production and what shouldn't.

3 I -- I take it from last week's hearing that Judge  
4 DeMarchi may be conferring with you about that -- about that  
5 issue or even Judge Koh potentially about that issue, but  
6 that's sort of one item that may come across your plate.

7 Other than that, I think from a case management  
8 standpoint, I don't think we have much to bother you about  
9 today.

10 **THE COURT:** Mr. Gutkin?

11 **MR. GUTKIN:** Yes, Your Honor. Judge DeMarchi took  
12 our -- so Judge Koh issued an -- a ruling. Both parties filed  
13 a request for clarification. And I think Judge Koh deferred  
14 to Judge DeMarchi on this. And in our hearing, which was this  
15 week on Tuesday, we actually presented oral argument including  
16 going through some of specific disputed CIDs, so I believe  
17 Judge DeMarchi has now heard argument on this and took the  
18 time to do that in our -- our lengthy hearing and is planning  
19 to rule on these issues.

20 That's my understanding, which is perhaps a bit different  
21 than Ms. Pritzker's, or maybe it's just a different way saying  
22 the same.

23 **THE COURT:** Well, I'm hopeful that she will.

24 **MS. PRITZKER:** I'm certain that she will. I think  
25 there was one maybe offhand comment that she might consult

1 with you on that one issue, but I'm sure she will take it into  
2 her own hands and deal with it.

3 **THE COURT:** Okay.

4 Great. Nothing else with you. Then it looks like I need  
5 to go back to -- is that *Calhoun vs. Google*.

6 **MS. PRITZKER:** It is, Your Honor. Thank you very  
7 much. Appreciate your time.

8 **MR. GUTKIN:** Thank you, Your Honor.

9 **THE COURT:** Thank you.

10 Okay. So it sounds like I need, Mr. Schapiro, for you to  
11 make a decision on your motion sooner than the 25th. That  
12 will solve the problem.

13 **MR. SCHAPIRO:** Is the problem that I'm hearing Ms. --  
14 Ms. Weaver describe, that they're having to decide which  
15 *Dauberts* to make in a state of some uncertainty? Because that  
16 has been -- was the case always under Judge Koh as well.

17 I mean, we're hearing now that they are filing a summary  
18 judgment motion. We've already filed two *Dauberts*, and so  
19 should Judge Koh not been elevated, we would all be in the  
20 same situation where you get three *Dauberts* and you use them  
21 as you choose.

22 But we're happy to make our decision anyway a little bit  
23 earlier. I'm just saying that I don't think there's  
24 really any -- any unfairness here. And giving more options to  
25 the plaintiffs would actually be treating them unequally.



1           **THE COURT:** I don't know what Ms. Weaver's thinking.

2           **MS. WEAVER:** Thank you, Your Honor.

3           Yes, I think now that we have clari- -- I think knowing  
4           whether or not they are bringing another summary judgment  
5           motion would help us know whether to trouble the court with  
6           three *Dauberts* on a class cert motion now.

7           We now have a confirmed summary judgment schedule, and  
8           that's the request. If -- if Your Honor wants us to lump it  
9           and just decide, that's fine. It just seemed to me these are  
10          so close in time -- we have a reply brief about to file and we  
11          could make a more judicious decision if we knew what Google's  
12          going to do.

13          **MR. SCHAPIRO:** The burden on the court will be the  
14          same ultimately. Three *Dauberts*. Whether there's one now and  
15          two later or two now and one later, it's -- it's three.

16          **THE COURT:** Okay. Mr. Schapiro, when can you make  
17          your decision?

18          **MR. SCHAPIRO:** Today is the 11th. Can we have one  
19          week till the 18th?

20          **THE COURT:** The 18th, it is.

21          All right.

22          **MR. SCHAPIRO:** Oh. And how are we to -- I apologize  
23          if you said this already, Your Honor.

24          How are we to communicate this? I know the court doesn't  
25          want informal emails or anything.

1           **THE COURT:** So if you're -- if you're taking it off,  
2 then I would expect by February 18th, to -- that you would  
3 file a notice of withdrawal of your motion without prejudice.  
4 And then it's done. If it's --

5           **MR. SCHAPIRO:** So -- so if we don't, then -- then  
6 that's that.

7           **THE COURT:** If -- right. If it's -- if it's still  
8 sitting there, I know that you're moving forward with it.

9           **MR. SCHAPIRO:** Got it. Thank you.

10          **MS. WEAVER:** And then, Your Honor, if they are  
11 letting us know on the 18th, may we have until the 19th to  
12 file our reply brief, because then we will know and we can  
13 make the decision.

14          **MR. SCHAPIRO:** Reply brief -- pardon, Ms. Weaver.  
15 Do you mean the reply brief on...?

16          **MS. WEAVER:** Class cert with the motion -- the  
17 *Daubert* motions. The -- the reason to accelerate the time  
18 line for you was so that we could know what you're doing with  
19 your motion and we can make a decision about our *Dauberts*, so  
20 we could do it the next day and we can have them in the can,  
21 but that is what we would ask.

22          **THE COURT:** So I -- Counsel, the hearing -- the -- I  
23 have a hearing date on -- in my chart, and it's probably in  
24 the papers but it's not in my chart.

25          The class certification motion and *Dauberts* per your

1 stipulation, you said was going to be filed the 15th or 16?

2 **MS. WEAVER:** It's not in writing, Your Honor. And if  
3 I can explain, there were three declarants who were never  
4 identified in initial disclosures who put in declarations on  
5 the opposition to class cert.

6 We conferred with opposing counsel. They agreed to let us  
7 take these depositions on -- today, so we're taking two today  
8 and one on Monday, and what we'd ask for and agreed to with  
9 Google is that we'd have two days from the day those  
10 transcripts were finalized. So it's a little bit indefinite,  
11 and I don't see much of a difference between the 16th, the  
12 17th, or the 19th, especially when the hearing is May 31st.

13 There's no prejudice to Google and giving us a couple days  
14 so that we can make an informed decision -- that's what we're  
15 thinking.

16 **THE COURT:** In terms of filing affirmative *Daubert*  
17 motions.

18 **MS. WEAVER:** Yes. They have five experts.

19 **MR. SCHAPIRO:** So --

20 **THE COURT:** There's no prejudice, right,  
21 Mr. Schapiro? It can wait till the 19th. Right?

22 **MR. SCHAPIRO:** I suppose -- if there was only the --  
23 the general prejudice that you have in every case when your  
24 adversary, who's already had a date extended a number of  
25 times, gets extra time to work on a brief.

1 But, yeah, I cannot point something that -- that would --  
2 beyond that, Your Honor.

3 **THE COURT:** Then if you -- if you file your -- if you  
4 file a notice one way or the other, then -- I don't -- how  
5 complicated do you all want me to be?

6 I could say 24 hours within the filing of the notice, but  
7 no late -- you know, sometime between 16th, 17th, or 18th.  
8 Really, folks, do I have to do this?

9 **MS. WEAVER:** I think we could decide on a date  
10 certain because we don't know when the transcripts will be  
11 available either.

12 And, Andrew, I understand your frustration, but I -- let's  
13 just reach an agreement here so the court can move on.

14 **MR. SCHAPIRO:** Yeah, I -- I agree also. This is --  
15 this is starting to get silly, so --

16 **THE COURT:** Right.

17 So talk to each other, is all I ask. Be professionals.  
18 You can have until the 19th. If they don't let you know until  
19 the 18th. If they let you know sooner, then your prior  
20 agreement stands. Okay?

21 **MS. WEAVER:** Understood.

22 **THE COURT:** Don't make me get upset with you. That's  
23 not where you want to be.

24 **MS. WEAVER:** I'm very sure of that, Your Honor. We  
25 will do that.

1           **MR. SCHAPIRO:** Yes, we can tell.

2           **THE COURT:** Already started sanctioning other people  
3 in some patent cases because they're being, you know, sloppy  
4 with their -- with their interactions with each other. I  
5 just -- I should not have to micromanage this.

6           **MR. SCHAPIRO:** I think we -- and I think Ms. Weaver  
7 will agree, we -- we have generally -- I think we both feel,  
8 you know, with the help of the magistrate judge and the  
9 special master have -- have managed to work out an awful lot  
10 among ourselves and, you know, the -- the issue is that  
11 there's -- that there's a whole lot of moving parts in this  
12 case. And -- and so even if we work out 90 percent of it, the  
13 10 percent is still not insignificant.

14           **THE COURT:** But this isn't one thing that I should  
15 have to micromanage.

16           **MR. SCHAPIRO:** Agreed.

17           **THE COURT:** Okay.

18           Figure it out. But you can have until the 19th.

19           **MS. WEAVER:** Thank you, Your Honor.

20           **THE COURT:** All right.

21           Anybody else want to talk about anything else before I  
22 adjourn and send you on your way now that I have an  
23 understanding of all these cases?

24           And feel free to turn on your video if you need to.

25           Five, four, three, two, one. Hearing none, everybody stay

1 safe. Enjoy the Super Bowl if you like football.

2 And I'm sure I will see all or some of you at some point,  
3 hopefully some day in person. But until then, we'll see you  
4 on Zoom.

5 Okay. Everybody take care.

6 (Simultaneous colloquy.)

7 **MS. PRITZKER:** Thank you very much, Your Honor.

8 **COUNSEL:** Thank you very much, Your Honor.

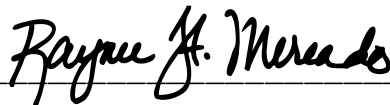
9 **THE COURT:** We're adjourned.

10 (Proceedings were concluded at 1:21 P.M.)

11 --o0o--

12  
13  
14 **CERTIFICATE OF REPORTER**

15  
16 I certify that the foregoing is a correct transcript  
17 from the record of proceedings in the above-entitled matter.  
18 I further certify that I am neither counsel for, related to,  
19 nor employed by any of the parties to the action in which this  
20 hearing was taken, and further that I am not financially nor  
21 otherwise interested in the outcome of the action.

22  
23 

24 Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

25 Tuesday, February 15, 2022